

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CARMEN DONELSON and DOUGLAS  
DONELSON, wife and husband,

Plaintiffs,

vs.

PROVIDENCE HEALTH & SERVICES  
- WASHINGTON d/b/a PROVIDENCE  
HEALTH CARE and d/b/a ST.  
JOSEPH CARE CENTER,

Defendant.

CV-10-157-EFS

ORDER GRANTING IN PART,  
DENYING IN PART, AND HOLDING  
IN ABEYANCE IN PART  
DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION TO EXCLUDE  
PLAINTIFF'S EXPERT WITNESS,  
DANIEL MCKINNEY

## INTRODUCTION

Plaintiffs Carmen and Douglas Donelson (collectively, "Plaintiffs") filed this action on May 18, 2010, alleging that Mrs. Donelson was terminated from her nursing position with St. Joseph Care Center (SJCC) in violation of the Washington Law Against Discrimination (WLAD), the Americans with Disabilities Act (ADA), and section 504 of the Rehabilitation Act, and alleging a common law cause of action for wrongful termination in violation of public policy. Plaintiffs further allege that Defendant's conduct caused Mr. Donelson to suffer loss of consortium.

1 Before the Court are two defense motions: Defendant's Motion for  
2 Summary Judgment, ECF No. [18](#), and Defendant's Motion to Exclude  
3 Plaintiffs' Expert Witness, Daniel McKinney, ECF No. [14](#). For the reasons  
4 discussed below, the Court grants in part, denies in part, and holds in  
5 abeyance in part Defendant's Motion for Summary Judgment, and grants  
6 Defendant's Motion to Exclude Plaintiffs' Expert Witness.

7 **DISCUSSION**

8 **I. PHS's Motion for Summary Judgment**

9 **A. Factual Background**<sup>1</sup>

10 SJCC is a non-profit skilled nursing facility providing 24-hour  
11 nursing and rehabilitation care at its 162-bed facility. SJCC offers  
12 services to patients who choose to live their remaining days at a skilled  
13 nursing facility, as well as to patients who need short-term assistance  
14 to recover from illness, surgery, or hospitalization. SJCC is a  
15 subsidiary of Defendant Providence Health & Services (PHS), a health care  
16 ministry of the Catholic Church sponsored by the Vatican. SJCC adheres  
17 to Providence's religious mission and purpose, providing spiritual and

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19 <sup>1</sup> In connection with Defendant's motion, the parties submitted a  
20 Joint Statement of Undisputed Facts. ECF No. [38](#). The Court treats these  
21 facts as established consistent with Federal Rule of Civil Procedure  
22 56(d), and sets these forth in this "Factual Background" section without  
23 reference to an ECF number. Any facts supported by a citation to the  
24 record are disputed and are presented in the light most favorable to  
25 Plaintiffs. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
26 (1986).

1 pastoral care services to its residents, employing a chaplain, and  
2 offering weekly religious services. SJCC's logo includes a cross. SJCC  
3 employees are not required to be Catholic or to participate in religious  
4 services, and SJCC provides care to patients of any faith or religious  
5 belief. SJCC strives to provide continuous care by having its caregivers  
6 develop an understanding of their resident's specific health care needs.

7 Plaintiff Carmen Donelson received her certification as a Nursing  
8 Assistant Certified (NAC) in 2002, and worked at several different  
9 facilities until she was hired for a full-time position at SJCC in March  
10 of 2009. Ms. Donelson worked as both a NAC and as a bath aide while  
11 employed at SJCC. Her job duties included assisting residents with their  
12 personal care, feeding, and transportation, as well as providing  
13 specialized care for patients in regard to their daily baths. Consistent  
14 with SJCC's policies for new employees, Ms. Donelson was subject to a  
15 ninety-day probationary period upon commencing her employment. SJCC's  
16 probation and medical leave policies provide that employees are not  
17 entitled to leave until they have completed their full probationary  
18 period.

19 On June 4, 2009, five days before the end of her probationary  
20 period, Ms. Donelson jammed her finger on a wheelchair while assisting  
21 a resident into a bath chair. After her finger became red, swollen, and  
22 painful the next day, Ms. Donelson went to the emergency room, where she  
23 was told she had sprained her finger. Ms. Donelson provided immediate  
24 notice of her injury to SJCC and initiated a worker's compensation claim.  
25 On June 10, 2009, Ms. Donelson submitted to SJCC a note from her doctor  
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1 indicating that she would be unable to return to work until June 17,  
2 2009.

3 On June 11, 2009, SJCC sent Ms. Donelson a letter informing her that  
4 she was not eligible for FMLA. Though SJCC's policies provide that  
5 employees are not entitled to leave until they have completed their full  
6 probationary period, SJCC placed Ms. Donelson on an unpaid six-week  
7 leave. The condition of Ms. Donelson's finger worsened over the next  
8 several weeks, and Ms. Donelson contracted MRSA (methicillin-resistant  
9 staphylococcus aureus), a dangerous antibiotic-resistant bacterial  
10 infection. Ms. Donelson's finger was subsequently amputated up to the  
11 first joint in late June 2009.

12 During the course of Ms. Donelson's unpaid leave, she submitted  
13 several additional letters from her treating physicians to SJCC. On June  
14 15, 2009, June 22, 2009, and July 1, 2009, Ms. Donelson's orthopedic  
15 surgeon submitted notes to SJCC stating that she would be unable to  
16 return to work until further notice. On July 2, 2009, Ms. Donelson's  
17 surgeon submitted a note stating that "[Ms. Donelson] has developed  
18 osteomyelitis of right index finger. Surgery is planned and she will  
19 need 6 weeks of antibiotics/wound care. She will be unable to return to  
20 work due to the infection until she is finished with this treatment." As  
21 of July 20, 2009, Ms. Donelson had exhausted her six weeks of unpaid  
22 medical leave, and her doctors had not provided her with a definite  
23 return to work date.

24 Ms. Donelson was terminated from SJCC on July 20, 2009. SJCC's  
25 termination letter stated that "if [Ms. Donelson was] rehired within one  
26 year reinstatement is available." Ms. Donelson continued to receive

1 medical treatment and engage in therapy until she was released to return  
2 to work on October 20, 2009.

3 Sometime after Ms. Donelson received clearance to return to work,  
4 her worker's compensation case manager left a message stating that SJCC  
5 would "love to have [her] come back." Ms. Donelson received the message  
6 but never returned the call, being unwilling to return to SJCC because  
7 she believed that she was terminated because of her injury. Ms. Donelson  
8 obtained other employment in November 2009, roughly two weeks after being  
9 released to work.

10 Plaintiffs filed this action on May 18, 2010, seeking general  
11 damages, special damages for lost wages, loss of future earnings and lost  
12 earning capacity, punitive damages under 43 U.S.C. § 1981a, and loss of  
13 consortium damages on behalf of Mr. Donelson. PHS now moves for summary  
14 judgment on all of Plaintiffs' claims.

15 **B. Summary Judgment Standard**

16 Summary judgment is appropriate if the "pleadings, the discovery and  
17 disclosure materials on file, and any affidavits show that there is no  
18 genuine issue as to any material fact and that the moving party is  
19 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once  
20 a party has moved for summary judgment, the opposing party must point to  
21 specific facts establishing that there is a genuine issue for trial.  
22 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving  
23 party fails to make such a showing for any of the elements essential to  
24 its case for which it bears the burden of proof, the trial court should  
25 grant the summary judgment motion. *Id.* at 322. "When the moving party  
26 has carried its burden of [showing that it is entitled to judgment as a

1 matter of law], its opponent must do more than show that there is some  
 2 metaphysical doubt as to material facts. In the language of [Rule 56],  
 3 the nonmoving party must come forward with 'specific facts showing that  
 4 there is a *genuine issue for trial.*'" *Matsushita Elec. Indus. Co. v.*  
 5 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (internal citation  
 6 omitted) (emphasis in original).

7 When considering a motion for summary judgment, the Court does not  
 8 weigh the evidence or assess credibility; instead, "the evidence of the  
 9 non-movant is to be believed, and all justifiable inferences are to be  
 10 drawn in his favor." *Anderson*, 477 U.S. at 255. This does not mean that  
 11 a court will accept as true assertions made by the non-moving party that  
 12 are flatly contradicted by the record. See *Scott v. Harris*, 550 U.S.  
 13 372, 380 (2007) ("When opposing parties tell two different stories, one  
 14 of which is blatantly contradicted by the record, so that no reasonable  
 15 jury could believe it, a court should not adopt that version of the facts  
 16 for purposes of ruling on a motion for summary judgment").

17 **C. Ms. Donelson's Washington Law Against Discrimination Claim**

18 PHS asserts that Ms. Donelson's WLAD claim must be dismissed because  
 19 PHS falls within the law's exemption for religious organizations.  
 20 Plaintiffs counter that: 1) PHS should be equitably estopped from  
 21 asserting its exempt status; 2) PHS does not fall within the exemption;  
 22 and 3) the WLAD's exemption for religious organizations violates Article  
 23 I, Section XI of the Washington Constitution.

24 **1. Estoppel Argument**

25 Plaintiffs assert that PHS should be estopped from asserting that  
 26 it is exempt under the WLAD's religious exemption because statements in

1 PHS's Equal Employment Opportunity (EEO) policy, given to new employees  
 2 upon hire, state that PHS will not discriminate on the basis of  
 3 disability.<sup>2</sup>

4 Under Washington law, a party asserting equitable estoppel must  
 5 demonstrate 1) an admission, statement, or act inconsistent with the  
 6 claim afterwards asserted, 2) action by the other party on the faith of  
 7 such admission, statement, or act, and 3) injury to such other party  
 8 resulting from allowing the first party to contradict or repudiate such  
 9 admission, statement, or act. *Farnam v. CRISTA Ministries*, 116 Wn.2d  
 10 659, 678-79 (1991) (en banc) (citing *Saunders v. Lloyd's of London*, 113  
 11 Wn.2d 330, 340 (1989)). "Estoppel focuses on the justified reliance of  
 12 the person asserting it." *Id.* at 679. Justifiable reliance is defined  
 13 by Washington courts as reliance that was "reasonable under the  
 14 circumstances." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828  
 15 (1998) (en banc).

16 For PHS to be estopped from asserting that it is covered by the  
 17 WLAD's religious exemption, Plaintiffs must show that the statement in  
 18 SJCC's EEO policy is inconsistent with asserting exemption from the WLAD,  
 19 that Ms. Donelson justifiably relied on the policy, and that Ms. Donelson  
 20 would be injured by PHS's exemption. Only the first two of these prongs  
 21 are at issue.

22 **i. Inconsistency with Claim**

23 In *Farnam*, the Supreme Court of Washington held that a religious  
 24 organization was not estopped from asserting its exemption under the WLAD

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26 <sup>2</sup> The EEO policy at issue was promulgated by SJCC, Plaintiff's  
 former employer and a subsidiary of Defendant PHS.

1 because it "at all times held itself out to [the plaintiff] as a  
 2 religious organization and never represented to her that it would not  
 3 assert the exemption." *Farnam*, 116 Wn.2d at 679. Whether SJCC's EEO  
 4 policy is inconsistent with PHS's assertion of exemption from the WLAD  
 5 thus turns on whether the statement is construed as a representation that  
 6 PHS would not assert the exemption. The EEO policy states in pertinent  
 7 part:

8       St. Joseph Care Center does not discriminate in employment  
 9       opportunities or practices on the basis of race, color,  
 10      religion, sex, national origin, sexual orientation, age,  
 11      disability, or any other characteristic protected by law.

12      Crane Decl., ECF No. [22](#) Ex. 15 at 78.

13      A similar issue arose recently in *French v. Providence Everett*  
 14      *Medical Center*, 2008 U.S. Dist. LEXIS 80125, Case No. C07-0217-RSL (W.D.  
 15      Wash. 2008). The employment policy at issue in *French* stated:

16        [The Defendant] supports the principles of equal employment  
 17        opportunity and will not discriminate with respect to race,  
 18        color, religion, sex, national origin, age, creed, the presence  
 19        of a disability, marital or veteran's status, or any other  
 20        basis prohibited by local, state, or federal laws in any aspect  
 21        of its employment or pre-employment practices.

22      *French*, 2008 U.S. Dist. LEXIS 80125, at \*24-25. The court in *French* held  
 23      that this language estopped the defendant from asserting its exemption  
 24      from the WLAD because "the statement [was] not qualified by 'as  
 25        applicable.'" *Id.* at \*25. Plaintiffs assert that this reasoning should  
 26      inform the Court's decision, notwithstanding the somewhat broader  
 27      language of the policy at issue in *French*.

28      The SJCC's EEO policy is not *per se* inconsistent with PHS's  
 29      assertion of exemption status under the WLAD; the policy does not  
 30      explicitly represent that SJCC agrees to be subject to the WLAD, and a

1 pledge not to *discriminate* is not necessarily inconsistent with a later  
2 claim of *exemption* from the WLAD. While SJCC's stated policy of non-  
3 discrimination is difficult to reconcile with the later assertion of an  
4 exemption that essentially gives SJCC license to discriminate, in light  
5 of the narrow standard set forth in *Farnam*, the Court finds that  
6 Plaintiffs have not shown that the EEO policy is inconsistent with PHS's  
7 assertion of exemption from the WLAD.

## ii. Justifiable Reliance

9 The parties also dispute whether Ms. Donelson justifiably relied on  
10 the SJCC's EEO policy. PHS argues that Ms. Donelson did not rely on the  
11 pledge because she stated during her deposition that she neither  
12 discussed the policy with anyone at SJCC nor made any decisions based on  
13 the policy. See Donelson Dep., 34:20-35:17, 87:17-87:19, ECF No. [31](#) Ex.  
14 6 at 8, 20. Ms. Donelson counters that these two admissions do not  
15 negate her reliance, and asserts that she "would not have accepted a  
16 position or worked for an employer who did not have an EEO policy and  
17 abide by it in spirit and practice." ECF No. [29](#) at 4.

18 Even viewing the presented evidence in the light most favorable to  
19 Ms. Donelson, the Court cannot reasonably conclude that she justifiably  
20 relied on the EEO policy. Plaintiff has not identified any specific  
21 action that she took or deferred as a result of the policy, and has  
22 admitted in her sworn testimony that she did not base any decisions on  
23 the policy. The Court thus finds that Ms. Donelson has not met her  
24 burden of showing that she justifiably relied on the policy.

1       Because Ms. Donelson has failed to carry her burden on the first two  
2 estoppel factors, the Court finds that PHS is not estopped from asserting  
3 its exempt status under the WLAD.

4                   **2. The WLAD's Religious Exemption**

5       The WLAD's religious exemption is found in the statute's definition  
6 of "employer," which excludes "any religious or sectarian organization  
7 not organized for private profit." R.C.W. 49.60.040(11).

8       The Washington State Court of Appeals has noted in a case involving  
9 another subsidiary of PHS that PHS's parent organization, Sisters of  
10 Providence, is a religious organization for purposes of the WLAD's  
11 religious exemption. *See Harris v. Providence Everett Medical Center*,  
12 161 Wn. App. 1039, 2011 WL 1843450 at \*3 (May 16, 2011) (unpublished  
13 opinion). The court in *Harris* declined to reach the question of whether  
14 a parent organization's status applies to facilities it operates,  
15 however, because it was not raised at the trial court level. *See id.*  
16 (noting that "[i]t appears that under *Farnam*, [the fact that the  
17 defendant was wholly owned by the Sisters of Providence] would render  
18 [the defendant] exempt from the statute."). After careful examination  
19 of *Farnam*, the Court concludes that as the Washington Supreme Court  
20 interprets the WLAD, a parent organization's religious status applies to  
21 facilities it operates. *See Farnam*, 116 Wn.2d at 674. The question is  
22 thus whether PHS or its parent organization, Sisters of Providence, is  
23 a "religious organization" under the WLAD.

24       What constitutes a religious organization is not defined in the  
25 WLAD, and has only been explored in two Washington cases. While PHS  
26 argues that these cases establish a three-part disjunctive test for

1 religious organizations, case law instead directs Courts to examine the  
 2 "entire factual context of the case, including the stated purpose of the  
 3 [organization]." *Farnam*, 116 Wn.2d at 677.

4 The first case to address the scope of the religious exemption,  
 5 *Hazen v. Catholic Credit Union*, involved a financial institution that had  
 6 been founded by a group of Catholic laymen. *Hazen v. Catholic Credit*  
 7 *Union*, 37 Wn. App. 502, 503-04 (1984). In finding that the religious  
 8 exemption did not apply to the credit union, the court in *Hazen* noted  
 9 that the credit union had no organizational ties to the Catholic Church,  
 10 that its bylaws stated a secular purpose of promoting thrift, and that  
 11 membership was not limited to Catholics. *Id.* at 504. Furthermore,  
 12 employees were hired on the basis of ability, and not religious devotion,  
 13 and no member of the Catholic clergy had served on its board of  
 14 directors. *Id.* Citing several dictionaries for the plain meaning of the  
 15 term "religion," the court in *Hazen* concluded that the defendant credit  
 16 union's actions did not represent "manifestations of devotion to a  
 17 superior being." *Id.* at 506.

18 The Supreme Court of Washington addressed the religious exemption  
 19 seven years later in *Farnam v. CRISTA Ministries*, 116 Wn.2d 659 (1991).  
 20 After an extended discussion of *Hazen*, the court in *Farnam* examined  
 21 institutional documents such as the defendant's articles of  
 22 incorporation, corporate bylaws, staff information manual, and nursing  
 23 staff mission statement. *Farnam*, 116 Wn.2d at 677-78. In holding that  
 24 the defendant was a religious organization under the WLAD, the court in  
 25 *Farnam* noted that the defendant required its employees to sign a  
 26 doctrinal statement, that the defendant began most days with prayers, and

1 that the defendant offered vesper services and had two chaplains on its  
 2 staff. *Id.* at 678.

3 Applying this broad factual inquiry to the uncontested evidence  
 4 before the Court, it is clear that both Defendant PHS and its subsidiary  
 5 SJCC fall within the meaning of a "religious organization" under the  
 6 WLAD. Defendant's mission statement includes "continu[ing] the healing  
 7 ministry of Jesus in the world of today with special concern for those  
 8 who are poor and vulnerable." Crane Decl., ECF No. [22](#) Ex. 1 at 2.  
 9 Defendant's articles of incorporation include among its purposes "any and  
 10 all other things . . . which are consistent with . . . the teachings and  
 11 laws of the Roman Catholic Church." *Id.* Ex. 2 at 1. PHS employs a  
 12 chaplain, allows volunteer nuns to work with residents, and offers weekly  
 13 religious services. ECF No. [38](#) ¶ 5. Most importantly, Defendant is "a  
 14 health care ministry of the Catholic Church sponsored by the Vatican."  
 15 *Id.* ¶ 3. This direct hierarchical connection with an organized religious  
 16 entity was lacking in both *Hazen* and *Farmer*, and is a strong indication  
 17 that Defendant is a "religious organization" under the WLAD.

18 Based on the uncontested evidence, the Court finds that PHS is  
 19 a religious organization under the WLAD, and that the WLAD's religious  
 20 exemption applies to PHS.

21 **3. Constitutionality of the WLAD's Religious Exemption**

22 Ms. Donelson asserts that the WLAD's religious exemption violates  
 23 Article I, Section 11 of the Washington Constitution when it is applied  
 24 to discrimination on grounds other than religion. Specifically, Ms.  
 25 Donelson argues that the exemption violates Section 11's anti-  
 26 establishment principle because it grants religious organizations broad

1 license to discriminate on grounds such as disability, gender, and race,  
 2 thereby improperly favoring religion over non-religion.

3       While Ms. Donelson challenges the religious exemption under Section  
 4 11, her memorandum cites only federal cases interpreting the First  
 5 Amendment to the United States Constitution. Defendant cites several  
 6 cases in support of the proposition that the WLAD's religious exemption  
 7 has been "upheld," but each case either involved a challenge under a  
 8 different constitutional provision, or the court did not reach the  
 9 Section 11 argument. See *MacDonald v. Grace Church Seattle*, 457 F.3d  
 10 1079, 1080 (9th Cir. 2006) (declining to reach federal constitutional  
 11 arguments); *Erdman v. Chapel Hill Presbyterian Church*, 156 Wn. App. 827,  
 12 848-50 (2010) (rejecting Fourteenth Amendment Equal Protection challenge  
 13 and not reaching state Privileges and Immunities argument); *Farnam*, 116  
 14 Wn.2d at 679 (declining to reach Section 11 argument).

15       Article I, Section XI of the Washington State Constitution provides  
 16 in pertinent part:

17       Absolute freedom of conscience in all matters of religious  
 18 sentiment, belief and worship, shall be guaranteed to every  
 19 individual, and no one shall be molested or disturbed in person  
 20 or property on account of religion; but the liberty of  
 21 conscience hereby secured shall not be so construed as to  
 22 excuse acts of licentiousness or justify practices inconsistent  
 23 with the peace and safety of the state. No public money or  
 24 property shall be appropriated for or applied to any religious  
 25 worship, exercise or instruction, or the support of any  
 26 religious establishment.

27 Wash. Const. Art I, § 11 (amended 1993).

28       The United States Supreme Court has noted that Section 11 is "far  
 29 stricter" than the Establishment Clause of the First Amendment to the  
 30 United States Constitution. *Witters v. Wash. Dep't of Servs. for the*  
*31 Blind*, 474 U.S. 481, 489 (1986) (citing *Witters v. Comm'n for the Blind*,

1 102 Wn.2d 624, 625 (1984) ("*Witters I*")). When the state appropriates  
2 or provides money or property for religious purposes, Washington courts  
3 apply the plain language of Section 11 as an "absolute" bar. *Witters v.*  
4 *State Comm'n for the Blind*, 112 Wn.2d 363, 368-69 (1989) ("*Witters II*").  
5 With regard to claims not involving the appropriation of public money or  
6 property for religious purposes, however, the proper Section 11 analysis  
7 appears to be an open question. See *Maylon v. Pierce Cnty.*, 79 Wn. App.  
8 452, 466-67 (1997) (analyzing chaplaincy clause of Section 11 under *State*  
9 *v. Gunwall* because "even when the court has used the *Gunwall* factors to  
10 analyze a provision of the state constitution and has determined that an  
11 independent [analysis is required], under a different context a new  
12 *Gunwall* analysis is required."); see also *Weiss v. Bruno*, 82 Wn.2d 199,  
13 215-17 (1973) (applying *Lemon v. Kurtzer* analysis); *State Dept. of Labor*  
14 & *Indus. v. Wendt*, 47 Wn. App. 427, 432 (1987) (stating during the  
15 interim between *Witters I* and *Witters II*, "[i]n determining whether a  
16 state statute impermissibly establishes religion under article 1, section  
17 11 of our constitution, our Supreme Court has adopted the [*Lemon v.*  
18 *Kurtzer*] 3-prong test developed by the United States Supreme Court in  
19 making the identical determination under the first amendment to the  
20 United States Constitution." (citing *Weiss*, 82 Wn.2d at 215-17)). The  
21 Court's research has not uncovered any Washington Supreme Court cases  
22 since *Witters II* was decided that have analyzed a Section 11 challenge  
23 to a statute of general applicability.

24 Because PHS's assertion of the WLAD exemption in a case involving  
25 discrimination on grounds other than religion appears to raise a novel  
26 and important question of state law, the Court is considering certifying

1 this question to the Supreme Court of Washington pursuant to RCW  
2 2.60.020. Doing so would afford the Washington Supreme Court an  
3 opportunity to rule on an issue of state constitutional law, as well as  
4 eliminate the possibility that the Court would rely on a speculative or  
5 erroneous interpretation of Section 11 in ruling on PHS's motion. See  
6 *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003) ("The certification  
7 procedure is reserved for state law questions that present significant  
8 issues, including those with important public policy ramifications, and  
9 that have not yet been resolved by the state courts.").

10 As such, the parties shall file a notice with the Court stating  
11 their positions regarding whether the Court should certify this issue to  
12 the Supreme Court of Washington by October 28, 2011. A party that  
13 requests certification shall include in its memorandum a proposed  
14 question for the Court to certify. A party that opposes certification  
15 shall file their response to the other party's proposed certified  
16 question, if any, no later than November 4, 2011.

17 The Court understands that compliance with this deadline may  
18 interfere with counsel's trial preparation, and is also cognizant of the  
19 burdens that further delay of trial may place upon the parties and their  
20 counsel. However, because this issue has been affirmatively raised, and  
21 may be dispositive of one of Ms. Donelson's claims, the Court finds this  
22 to be a necessary step. If the Court does certify a question to the  
23 Supreme Court of Washington on this issue, the November 14, 2011 trial  
24 date will be stricken.

25 On this last point, the Court notes that due to conflicts with its  
26 criminal trial schedule, the trial date in this matter is likely to be

1 stricken regardless of whether the Court certifies a question to the  
2 Supreme Court of Washington. The Court has a criminal jury trial  
3 beginning on Thursday, November 10, 2011, and even if that trial is not  
4 held, the Court currently has *nine* separate criminal jury trials set to  
5 begin on November 14, 2011; if any one of those cases goes to trial, the  
6 trial date in this case will be stricken.

7 Accordingly, the Court holds PHS's motion in abeyance with regard  
8 to Ms. Donelson's WLAD claim.

9 **D. Ms. Donelson's Americans with Disabilities Act Claim**

10 Ms. Donelson also alleges that Defendant violated her rights under  
11 the ADA when it failed to accommodate her disability and terminated her  
12 as a result of her disability.<sup>3</sup>

13 The ADA prohibits an employer from discriminating "against a  
14 qualified individual with a disability because of the disability." 42  
15 U.S.C. § 12112(a). A *prima facie* claim for discrimination under the ADA  
16 thus requires showing that 1) the individual is a disabled person within  
17 the meaning of the ADA, 2) the individual is a qualified individual, and  
18 3) the employer terminated the individual because of their disability.

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19

20 <sup>3</sup> In her responsive memorandum, Ms. Donelson appears to assert for  
21 the first time a claim for retaliation. ECF No. [29](#) at 19. Ms. Donelson  
22 does not indicate whether this claim is based on the WLAD or the ADA, and  
23 cites both state and federal precedent in support of her argument.  
24 Because Ms. Donelson's complaint did not allege a cause of action for  
25 retaliation, and Ms. Donelson has not been given leave to amend her  
26 complaint, the Court does not consider this claim.

1 *Kennedy v. Applause*, 90 F.3d 1477, 1481 (9th Cir. 1996) (citing *White v.*  
2 *York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995)). The parties do not  
3 dispute that Ms. Donelson was disabled under the ADA. Instead, PHS  
4 argues that 1) Ms. Donelson was not a "qualified individual" under the  
5 ADA, and alternatively, 2) SJCC's six-week unpaid medical leave was a  
6 reasonable accommodation under the ADA.

7 **1. Qualified Individual**

8 A "qualified individual" is defined in the ADA as one "who, with or  
9 without reasonable accommodation, can perform the essential functions of  
10 the employment position that such individual holds or desires." 42  
11 U.S.C. § 12111(8). PHS argues that Ms. Donelson was not a qualified  
12 individual under the ADA at the time of her termination because she was  
13 unable to perform the essential functions of her position including,  
14 among other things, pushing a wheelchair. This argument is based on a  
15 flawed reading of the definition of "qualified individual."

16 *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999),  
17 provides an instructive example. The plaintiff in *Nunes* was employed as  
18 a sales associate at Wal-Mart when she began to suffer stress-related  
19 "syncopal episodes" that caused her to faint. *Nunes*, 164 F.3d at 1245.  
20 Ms. Nunes began an extended medical leave for diagnosis and treatment of  
21 her condition, and provided her employer with several letters from her  
22 treating physicians that documented her illness. *Id.* at 1245-46. After  
23 almost six months of medical leave, Ms. Nunes was terminated. *Id.* Ms.  
24 Nunes filed suit and her former employer moved for summary judgment. *Id.*  
25 at 1246.

26

1       The district court granted the Wal-Mart summary judgment on the  
2 issue of whether Ms. Nunes was a qualified individual on the ground that  
3 she could not perform the essential functions of her position on the date  
4 she was terminated. *Id.* at 1246-47. The Ninth Circuit reversed on the  
5 grounds that the district court misapplied the ADA's qualified individual  
6 standard. *Id.* at 1247. Because the ADA requires individuals to be able  
7 to perform essential job functions "with or without reasonable  
8 accommodation," and because unpaid medical leave may be a reasonable  
9 accommodation under the ADA, the Ninth Circuit held that "[i]f Nunes's  
10 medical leave was a reasonable accommodation, then her inability to work  
11 during the leave period would not automatically render her unqualified."  
12 *Id.* The logic behind the Ninth Circuit's holding is pellucid: if an  
13 employee's ability to perform essential job functions were evaluated  
14 solely with regard to the period of time during which they were on  
15 medical leave, no employee that was forced by disability to take medical  
16 leave could ever be a "qualified individual" under the ADA.

17       PHS has devoted its briefing to demonstrating that Ms. Donelson was  
18 unable to perform the essential functions of her job during the time that  
19 she was on medical leave. The pertinent question, however, is whether  
20 Ms. Donelson was able to perform the essential functions of her job *with*  
21 *or without reasonable accommodation*. Because it is undisputed that Ms.  
22 Donelson was able to perform the functions of a NAC both before and after  
23 she returned from medical leave, Ms. Donelson is a "qualified individual"  
24 under the ADA and PHS's motion turns on whether Plaintiff's medical leave  
25 was a reasonable accommodation.

26

## 2. Reasonable Accommodation

"Reasonable accommodation" is defined, as is relevant here, as  
"modifications or adjustments to the work environment, or to the manner  
or circumstances under which the position held or desired is customarily  
performed, that enable an individual with a disability who is qualified  
to perform the essential functions of that position." 29 C.F.R. §  
1630.2(o)(1)(ii) (2011). Employers covered by the ADA are "required,  
absent undue hardship, to provide a reasonable accommodation to an  
otherwise qualified individual." *Id.* at § 1630.2(o)(4). "Undue  
hardship" is defined as "an action requiring significant difficulty or  
expense." See 42 U.S.C. § 12111(10)(A). Determining whether an  
accommodation would involve undue hardship requires an examination of the  
nature and cost of the accommodation, the overall impact of the  
accommodation on the facility, the overall impact of the accommodation  
on the covered entity, and the type of operation of the covered entity,  
including the composition, structure, and functions of the entity's  
workforce. *Id.* at § 12111(10)(B).

18 Determining whether a proposed accommodation is reasonable,  
19 including whether it imposes an undue hardship on the employer, requires  
20 a "fact-specific, individualized inquiry." *Nunes*, 164 F.3d at 1247. "In  
21 the summary judgment context, a court should weigh the risks and  
22 alternatives, including possible hardships on the employer, to determine  
23 whether a genuine issue of material fact exists as to the reasonableness  
24 of the accommodation." *Id.* (citing *Barnett v. U.S. Air, Inc.*, 157 F.3d  
25 744, 752 (9th Cir. 1998)); see also *Willis v. Conopco, Inc.*, 108 F.3d  
26 282, 285 (11th Cir. 1997).

1       Here, PHS submitted material evidence showing that SJCC's  
2 accommodation of Ms. Donelson's disability was reasonable: SJCC gave Ms.  
3 Donelson six weeks of unpaid medical leave even though she was still in  
4 her probationary period; SJCC offered Ms. Donelson reinstatement with all  
5 benefits relating back to her date of hire if she returned within one  
6 year; and SJCC contacted Ms. Donelson to offer her open positions once  
7 she was cleared to return to work (albeit after she had been terminated).  
8 PHS has also shown that Ms. Donelson's extended leave caused SJCC  
9 hardship by interfering with its goal of providing its residents with  
10 continuous and consistent care. On the other hand, Ms. Donelson counters  
11 that her unpaid medical leave caused no financial harm to SJCC, and that  
12 PHS's continuity argument lacks merit because SJCC often filled the NAC  
13 position with temporary employees.

14       In light of this conflicting evidence and fact-specific nature of  
15 the question presented, the Court finds that material factual issues  
16 exist with regard to whether Ms. Donelson's medical leave was a  
17 "reasonable accommodation" under the ADA. Accordingly, the Court denies  
18 PHS's motion with regard to Ms. Donelson's ADA claim.

19       **E. Ms. Donelson's Rehabilitation Act Claim**

20       Section 504 of the Rehabilitation Act provides that "[n]o otherwise  
21 qualified individual with a disability . . . shall, solely by reason of  
22 her or his disability, be excluded in, be denied the benefits of, or be  
23 subjected to discrimination under any program or activity receiving  
24 Federal financial assistance." 29 U.S.C. § 794. PHS argues that Ms.  
25 Donelson's Rehabilitation Act claim must fail 1) because Ms. Donelson has  
26

1 failed to show that PHS receives federal funding, and 2) because it  
 2 suffers the same insufficiency of proof that Plaintiff's ADA claim does.

3                   **1. Federal Funding**

4                   PHS moves for summary judgment on Ms. Donelson's Rehabilitation Act  
 5 claim on the ground that Ms. Donelson has not shown that either PHS or  
 6 SJCC receives federal funding. In response to PHS's motion, Ms. Donelson  
 7 submitted a facsimile copy of Defendant's web site which appears to  
 8 acknowledge that it is "a recipient of Federal financial assistance."  
 9 Mann Decl., ECF No. [31](#) Ex. 1 at 1. PHS responds that this web site is  
 10 for a "different hospital and it does not specifically mention SJCC." ECF  
 11 No. [34](#) at 16. But PHS is the Defendant in this matter, not SJCC, and Ms.  
 12 Donelson's exhibit clearly states that "Providence Health & Services -  
 13 Washington/Montana Region" receives federal financial assistance;  
 14 presumably, Providence Health & Services - Washington/Montana Region  
 15 includes Defendant Providence Health & Services - Washington.  
 16 Accordingly, the Court finds that PHS receives federal funding.

17                   **2. Insufficient Allegations**

18                   Because the Rehabilitation Act's language provided a model for the  
 19 ADA, federal courts apply the same analysis to each. See 42 U.S.C. §  
 20 12133 ("The remedies, procedures, and rights set forth in [the  
 21 Rehabilitation Act] shall be the remedies, procedures, and rights  
 22 [applicable to ADA claims]."); see also *Wong v. Regents of Univ. of*  
 23 *Calif.*, 192 F.3d 807, 811 n.2 (9th Cir. 1999) ("The ADA and the  
 24 Rehabilitation Act, as they apply to the parties in this case, create the  
 25 same rights and obligations."). The only significant difference between  
 26 the two acts is the Rehabilitation Act's requirement that the program in

1 question receive federal financial assistance. *Zukle v. Regents of Univ.*  
2 *of Calif.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999). Just as with  
3 Plaintiff's ADA claim, there are significant factual questions regarding  
4 whether SJCC's conduct represented a reasonable accommodation of Ms.  
5 Donelson's disability, and the Court thus denies PHS's motion with regard  
6 to Ms. Donelson's Rehabilitation Act claim.

7 **F. Mr. Donelson's Loss of Consortium Claim**

8 PHS argues that Plaintiff Douglas Donelson's loss of consortium  
9 claim should be dismissed if Plaintiff's other claims are dismissed.  
10 While "loss of consortium has been held a separate, independent,  
11 nonderivative action of the deprived spouse . . . an element of this  
12 cause of action is the 'tort committed against the impaired spouse.'" *Conradt v. Four Star Promotions, Inc.*, 45 Wn. App. 847, 853 (1986). In  
13 the context of loss of consortium claims, Washington courts have held  
14 that violation of the WLAD is a tort. See *Burchfiel v. Boeing Corp.*, 149  
15 Wn. App. 468, 494 (2009). By analogy, violations of the ADA and/or the  
16 Rehabilitation Act would also sound in tort under Washington law. Thus,  
17 because several of Ms. Donelson's claims survive, the Court denies PHS's  
18 motion in this regard.

20 **G. Ms. Donelson's Wrongful Discharge in Violation of Public Policy  
Claim**

21 Ms. Donelson initially asserted a state common law claim for  
22 wrongful discharge in violation of public policy, but later withdrew this  
23 claim in her response to Defendant's Motion for Summary Judgment. ECF  
24 No. [29](#) at 20. Accordingly, PHS's motion is granted in this regard and  
25 this claim is dismissed.

1           **H. Conclusion**

2           For the foregoing reasons, the Court grants in part, denies in part,  
3 and holds in abeyance in part PHS's Motion for Summary Judgment. The  
4 Court holds Defendant's motion in abeyance with regard to Ms. Donelson's  
5 WLAD claim, pending briefing on whether it should certify a question to  
6 the Washington Supreme Court. The Court denies PHS's motion with regard  
7 to Ms. Donelson's ADA and Rehabilitation Act claims, and with regard to  
8 Mr. Donelson's loss of consortium claim. Finally, the Court grants PHS's  
9 motion with regard to Ms. Donelson's wrongful discharge in violation of  
10 public policy claim.

11           **II. PHS's Motion to Exclude Plaintiffs' Expert Witness Daniel McKinney**

12           PHS moves to exclude the testimony of Plaintiffs' expert witness  
13 Daniel McKinney. Mr. McKinney is a certified vocational rehabilitation  
14 counselor who would testify that extending Ms. Donelson's unpaid medical  
15 leave was a reasonable accommodation that was available to SJCC. PHS  
16 objects to Mr. McKinney's testimony as 1) irrelevant and not helpful to  
17 the jury; 2) stating an impermissible legal conclusion; 3) lacking  
18 reliability; and 4) lacking qualification. The Court addresses the first  
19 three of these arguments and does not reach the last.

20           Federal Rule of Evidence 702 imposes an obligation on the trial  
21 judge to screen expert testimony:

22           If scientific, technical, or other specialized knowledge will  
23 assist the trier of fact to understand the evidence or to  
24 determine a fact in issue, a witness qualified as an expert by  
25 knowledge, skill, experience, training, or education, may  
26 testify thereto in the form of an opinion or otherwise, if (1)  
the testimony is based upon sufficient facts or data, (2) the  
testimony is the product of reliable principles and methods,  
and (3) the witness has applied the principles and methods  
reliably to the facts of the case.

1 Fed. R. Evid. 702.

2 Once a proffered expert's testimony is challenged, the district  
3 court has a "gatekeeping responsibility" to ensure that the testimony has  
4 "a reliable basis in the knowledge and experience of [the relevant]  
5 discipline." *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 149  
6 (1999); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert*  
7 *v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). The Court's gatekeeper role  
8 applies not only to scientific testimony, but to all expert testimony.  
9 *Kumho Tire Co. Ltd.*, 526 U.S. at 148. The proponent of the expert has  
10 the burden of proving by a preponderance of evidence that the expert's  
11 testimony is admissible. *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594,  
12 598 (9th Cir. 1996); *Daubert*, 509 U.S. at 592 n.10. For the reasons  
13 discussed below, the Court grants PHS's motion and excludes Mr.  
14 McKinney's expert testimony.

15 **A. Relevance and Helpfulness Objections**

16 Ms. Donelson seeks to prove through Mr. McKinney's testimony that  
17 an extension of her medical leave was a "reasonable accommodation" that  
18 was available to SJCC. PHS objects to this testimony as both irrelevant  
19 and not helpful to the jury.

20 Evidence is relevant if it has "any tendency to make the existence  
21 of any fact that is of consequence to the determination of the action  
22 more probable or less probable than it would be without the evidence."  
23 Fed. R. Evid. 401. In addition to being relevant, expert testimony must  
24 be helpful, that is, it must "assist the trier of fact to understand the  
25 evidence or to determine a fact in issue." Fed. R. Evid. 702.

1       Mr. McKinney's testimony would be both relevant and helpful to the  
2 jury. Mr. McKinney has worked as a vocational rehabilitation counselor  
3 since 1980, and his services include drafting vocational assessments, job  
4 analyses, and job development and placement plans. Mr. McKinney's  
5 testimony meets the relevance standard in Rule 401 because it would  
6 likely make material facts such as Plaintiff's vocational capabilities  
7 and job placement options more or less probable than without his  
8 testimony. Mr. McKinney's testimony also meets the helpfulness standard  
9 in Rule 702 because it would likely assist the jury to understand why  
10 disabled individuals' need for medical leave.

11       **B. Testimony Regarding Legal Conclusion**

12       "It is well-established . . . that expert testimony concerning an  
13 ultimate issue is not per se improper." *Mukhtar v. Cal. State Univ.,*  
14 *Hayward*, 299 F.3d 1053, 1066 n.10 (9th Cir. 2002). Indeed, Rule 704  
15 provides that expert testimony that is "otherwise admissible is not  
16 objectionable because it embraces an ultimate issue to be decided by the  
17 trier of fact." Fed. R. Evid. 704(a). But an expert witness cannot  
18 opine as to her legal conclusion, that is, an opinion on an ultimate  
19 issue of law. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d  
20 998, 1016-17 (9th Cir. 2004). "In other words, an expert may offer his  
21 opinion as to facts that, if found, would support a conclusion that the  
22 legal standard at issue was satisfied, but he may not testify as to  
23 whether the legal standard has been satisfied." *Burkhart v. Wash. Metro.*  
24 *Area Transit Auth.*, 112 F.3d 1207, 1212-13 (D.C. Cir. 1997).

25       Here, Ms. Donelson states that Mr. McKinney will testify "that  
26 extending Ms. Donelson's unpaid leave was a reasonable accommodation that

1 was available to the defendants." ECF No. 25 at 2 (emphasis added). This  
2 is testimony regarding the ultimate issue of law because it parrots the  
3 precise language of the WLAD and ADA's cause of action for  
4 discrimination. Furthermore, the use of the word "reasonable" signals  
5 that Mr. McKinney will testify to an issue that is within the jury's  
6 fact-finding duty; the phrase "reasonable accommodation" will undoubtedly  
7 appear on the verdict form that is given to the jury at the conclusion  
8 of Defendant's case. Accordingly, the Court excludes testimony by Mr.  
9 McKinney that relates to whether unpaid medical leave was a reasonable  
10 accommodation.

11 **C. Reliability**

12 PHS also argues that Mr. McKinney's testimony would not be reliable  
13 because he has not conducted independent investigation regarding Ms.  
14 Donelson's injury, the job description for the NAC position, or SJCC's  
15 organization.

16 Federal Rule of Evidence 702 requires that an expert's testimony 1) be  
17 based upon sufficient facts or data, 2) be the product of reliable  
18 principles and methods, and 3) be based upon an application of the  
19 principles and methods to the facts of the case that is "reliable." Fed.  
20 R. Evid. 702. *Daubert* set forth several reliability factors which  
21 include whether the theory or method is testable, whether the method has  
22 been subject to peer review and publication, and whether the method is  
23 generally accepted. *Daubert*, 509 U.S. at 593-95. The central focus of  
24 *Daubert's* reliability requirement "is to make certain that an expert,  
25 whether basing testimony upon professional studies or personal  
26 experience, employs in the courtroom the same level of intellectual rigor

1 that characterizes the practice of an expert in the relevant field."  
2 *Kumho Tire Co. Ltd.*, 526 U.S. at 152.

3       Here, Mr. McKinney's deposition testimony illustrates the lack of  
4 reliability in the method through which he formed his opinions. In  
5 preparation for this matter, Mr. McKinney reviewed only three documents  
6 relevant to SJCC: a July 28, 2008 SJCC personnel policy document; a June  
7 10, 2009 email from Linda Flint Childs; and a June 11, 2009 "legal  
8 absence determination" from one of SJCC's human resources employees. Mr.  
9 McKinney also reviewed the Ninth Circuit's opinion in *Nunes* and select  
10 provisions of the Code of Federal Regulations implementing the ADA. Mr.  
11 McKinney also apparently conducted one to two hours of online research  
12 regarding the ADA using the internet search engine Google.com. Mr.  
13 McKinney readily concedes that he has no formal training in the ADA or  
14 WLAD or in relevant human resources practices. Because Mr. McKinney has  
15 not demonstrated that his opinions were formed after sufficient  
16 independent investigation to make them reliable under Rule 702, the Court  
17 grants PHS's motion and excludes him from testifying as an expert  
18 witness.

19 **III. Conclusion**

20       For the reasons discussed above, the Court grants in part and denies  
21 in part PHS's Motion for Summary Judgment and requires the parties to  
22 state their opinions regarding whether the Court should certify the  
23 question of the WLAD's religious exemption violates the Washington  
24 Constitution to the Washington Supreme Court. The Court grants PHS's  
25 Motion to Exclude Plaintiffs' Expert Witness, Daniel McKinney.

26

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Summary Judgment, **ECF No. 18**, is **GRANTED**  
3 **in part** (wrongful discharge claim), **DENIED in part** (ADA, Rehabilitation  
4 Act, and loss of consortium claims), and **HELD IN ABEYANCE in part** (WLAD  
5 claim).

6 2. The parties shall file a notice with the Court regarding their  
7 position on whether the Court should certify the question of the WLAD's  
8 religious exemption is constitutional **no later than October 28, 2011**. A  
9 party that *requests* certification shall include in its memorandum a  
10 proposed question for the Court to certify. A party that *opposes*  
11 certification shall file its response to the other party's proposed  
12 certified question, if any, **no later than November 4, 2011**.

13 3. Defendant's Motion to Exclude Plaintiffs' Expert Witness, Daniel  
14 McKinney, **ECF No. 14**, is **GRANTED**.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
16 this Order and provide copies to counsel.

17 **DATED** this 14<sup>th</sup> day of October 2011.

18  
19 \_\_\_\_\_  
20 s/Edward F. Shea  
EDWARD F. SHEA  
United States District Judge